

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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In the Matter Of

FEDERAL COMMUNICATIONS COMMISSIC.
OFFICE OF SECRETARY

Streamlining Broadcast EEO
Rules and Policies, Vacating the EEO
Forfeiture Policy Statement
and Amending Section 1.80 of
the Commission's Rules to Include
EEO Forfeiture Guidelines

MM Docket No. 96-16

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COMMENTS OF

**NATIONAL ORGANIZATION FOR WOMEN FOUNDATION,
AMERICAN WOMEN'S ROUNDTABLE,
CENTER FOR MEDIA EDUCATION,
FEMINIST MAJORITY FOUNDATION,
NATIONAL CONFERENCE OF PUERTO RICAN WOMEN,
NOW LEGAL DEFENSE AND EDUCATION FUND,
PHILADELPHIA LESBIAN AND GAY TASK FORCE,
WIDER OPPORTUNITIES FOR WOMEN, AND
WOMEN IN COMMUNICATIONS**

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SUMMARY

The Commission's proposals to "streamline" EEO respond to a largely imagined problem--the so-called "burden" of recordkeeping and filing. Given the importance of the FCC's EEO rules in equalizing employment opportunities for minorities and women and leading to diversity in programming and ownership, broadcast stations have not demonstrated that any "burden" imposed by these rules is "undue." We submit that to the extent an "undue" administrative burden exists, the Telecommunications Act of 1996, which authorizes eight-year license terms, provides adequate relief.

Each of the "streamlining" proposals in the Notice would, contrary to the stated goal, undermine the effectiveness of the Commission's EEO policy by significantly reducing the number of stations reporting. EEO reporting is essential to effective EEO enforcement. If the Commission is serious about reducing burden without undermining the effectiveness of EEO, we agree with American Women in Radio and Television ("AWRT") that a negotiated rulemaking provides a better forum for identifying ways to make EEO compliance more effective as well as less burdensome.

Finally, we support the concept of including a forfeiture policy in the Commission's rules. However, for forfeitures to be effective incentives for EEO compliance, the Commission must set a higher base forfeiture amount. In addition, the Commission should clarify that licensees are expected to recruit for all vacancies, should define "violation" to reflect the greater efforts expected of larger stations, and should define "period under review" to permit separate analysis of each year of the license term.

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COMMENTS OF

NOW Foundation, et al.

The National Organization for Women Foundation, American Women's Roundtable, Center for Media Education, Feminist Majority Foundation, National Conference on Puerto Rican Women, Philadelphia Lesbian and Gay Task Force, Wider Opportunities for Women, and Women in Communications (hereinafter collectively referred to as "Commenters")¹ respectfully submit Comments in response to

¹ The **National Organization for Women Foundation** is a 501(c)(3) organization devoted to furthering women's rights through education and litigation. NOW Foundation is affiliated with the National Organization for Women, the largest feminist organization in the United States, with a membership of over 250,000 women and men in more than 600 chapters in all 50 states and the District of Columbia. Since its inception in 1986, a major goal of NOW Foundation has been to ensure fair treatment for women and an end to discrimination of all kinds. We continue to have a strong interest in the accountability of the broadcast industry and urge the FCC to strengthen, not weaken, the EEO reporting requirements.

The **American Women's Roundtable** is a non-profit organization initiated by the National Women's Conference Committee and built on existing advocacy coalitions. The American Women's Roundtable has as its central intent the implementation of a healthy, interactive media model that will facilitate direct dialogue with government and serve as a point of access and synergy for diverse women and girls, policy makers,

local organizers, activists, and educators. National video conferences will downlink to community college women's centers, churches, and United Artist theaters to air critical issues, put forward viable solutions, and educate women about participation in the democratic processes. Linking new technologies and media at grassroots and national levels, the American Women's Roundtable will facilitate a multimedia "clearinghouse" for women's voices to be heard on priority issues, including expanding public support for women and feminist men in the media.

The **Center for Media Education ("CME")** is a non-profit public interest policy and research organization dedicated to promoting the democratic potential of the electronic media. CME's goal of developing and promoting the public interest in media policies includes advancing the employment interests of women and minorities within the broadcast industry.

Founded in 1987, the **Feminist Majority Foundation** is a non-profit organization at the forefront of creating innovative feminist research, education, and training programs for women's equality and empowerment. The Foundation organized the first-ever national feminist exposition, which was held in February, 1996. Among other feminist issues, the exposition included a general assembly on countering initiatives designed to eliminate laws prohibiting sex and race discrimination. Over 100 organizations and companies dedicated to women's advancement were represented.

Established in 1975, the **National Conference of Puerto Rican Women (NACOPRW)** is a non-profit organization that promotes the equal participation of Puerto Rican and other Latina women in the social, economic, and political life of the United States. NACOPRW fulfills its mission through educational programs and advocacy that promotes equal access of Puerto Rican and other Latina women to all institutional sectors, including the telecommunications industry.

The **Philadelphia Lesbian and Gay Task Force** is a civil and human rights advocacy organization formed in 1978. Its statewide research efforts in discrimination and violence, as well as its negotiations in public policy, focus on civil rights and mass media and education equity on behalf of nearly one million gay and lesbian people. Since 1989, the Task Force has been extensively involved in mass media research as well as efforts to challenge Philadelphia broadcast licenses for the consistent underrepresentation, marginalization, and devaluation of women and racial and ethnic minorities in both programming and employment.

Wider Opportunities for Women is a national women's employment organization that works to achieve economic independence and equal opportunity for women and girls. For nearly 30 years, Wider Opportunities for Women has helped women learn to earn, with programs emphasizing literacy, technical and nontraditional skills, and career development. It also leads the Women's Work Force Network, which is comprised of over 500 independent women's employment programs and reaches more than 300,000 women each year.

For 86 years **Women in Communications** has sought to strengthen the position of women working in all fields of communications. One of its primary goals is to encourage diversity in all fields of communications. Women in Communications has 70

the Order and Notice of Proposed Rule Making ("Notice" or "NPRM") of the Federal Communications Commission ("FCC" or "Commission"), in the above referenced proceeding, released February 16, 1996, concerning "streamlining" the FCC's broadcast equal employment opportunity (EEO) rules and policies.

Introduction

In this Notice, the Commission generally seeks comment on several proposals aimed at reducing the administrative "burdens" associated with its equal employment opportunity policy--reductions that we believe will significantly impair the effectiveness of the policy. These "streamlining" proposals constitute an unprecedented retreat from a commitment to equal employment opportunity that dates back to the early 1970's and that has been repeatedly affirmed by the Commission, Congress and the courts. One of the proposals would render the EEO rule unenforceable against more than 50 percent of all broadcast stations, thus substantially decreasing employment opportunities for women and minorities in broadcasting.

In a 1994 Report to Congress on equal employment opportunity in the broadcast and cable industries, the Commission acknowledged that although its EEO "policy has been effective in increasing the employment of minorities and women in overall and upper-level positions, and individual upper-level job categories . . . the percentages of

national, professional chapters that provide women with a variety of opportunities for education, training, professional development, networking, and career advancement. In addition, the organization supports The Women in Communications Foundation, which was created to stimulate and accelerate the advancement of women at all levels of the communications profession.

women and minorities in the broadcast industry in 1993 . . . remained below the comparable figures for the 1993 overall national workforce.”² The Commission concluded that a “continuing need exists for EEO enforcement in the communications industry” and committed to improving its EEO policy.³

This commitment to EEO enforcement remains critical. An April 1996 report on minority ownership of commercial broadcast stations published by the National Telecommunications and Information Administration indicates that ownership of commercial radio and television stations has remained relatively constant since 1992.⁴ Given the fundamental connection between management experience and ownership,

² Implementation of Commission’s EEO Rules, Report, 9 FCC Rcd. 6276, 6314 (1994) (hereinafter “1994 Report to Congress”).

³ 1994 Report to Congress, at 6321. The Commission’s 1995 Broadcast and Cable Employment Report reveals that 40.7 percent of all positions and 34.2 percent of management positions are filled by women (an increase of only 0.8 and 1.3 percent from 1994); that 19.7 percent of all positions and 17.5 percent of management positions are filled by minorities (an increase of only 1 and 1.2 percent from 1994). While Commenters realize that these statistics represent real progress, it is clear that the percentage of female and minority employees in broadcasting remains well below the goal of 100 percent parity.

⁴ U.S. Dept. of Commerce, National Telecommunications and Information Administration, Minority Commercial Broadcast Ownership in the United States, 1 (April 1996). Specifically, minority ownership of commercial broadcast stations only increased by seven in 1995: the number of minority-owned AM radio stations decreased by five; FM radio station ownership increased by six; and television station ownership increased by six. Of the 11,412 commercial broadcast stations licensed in the United States in 1995, minorities owned 293 radio stations and 37 television stations. Id. at 2 (Table 1).

the FCC's EEO policy is a key element to achieving diversity in media ownership and programming.⁵

Commenters believe that the current broadcasting EEO "streamlining" proposal is an ill-advised step backward which responds to a largely imagined problem--the so-called "burden" of recordkeeping and filing.⁶ These Comments argue that broadcast stations have not demonstrated that the Commission's EEO rule unduly burdens them. Even if there were evidence of this "undue" administrative burden, none of the "streamlining" proposals in the Notice would reduce that burden without significantly undermining the effectiveness of the Commission's EEO policy. We submit that to the extent an "undue" administrative burden exists, the Telecommunications Act of 1996, which authorized eight-year license terms, provides adequate relief. If the Commission finds it necessary to devise other ways to reduce burdens, we agree with American

⁵ In its **Market Entry Barriers Notice of Inquiry**, the Commission notes that the Cable Communications Policy Act of 1984 recognizes EEO requirements as "particularly important in the mass media area where employment is a critical means of assuring that program service will be responsive to a public consisting of a diverse array of population groups," and that a strong EEO policy is necessary to assure that there are sufficient numbers of minorities and women with professional and management experience who will be able to take advantage of ownership opportunities." **Section 257 Proceeding to Identify and Eliminate Market Entry Barriers for Small Businesses, Notice of Inquiry**, GN Docket No. 96-113, at para. 23 (May 21, 1996) (hereinafter "**Market Entry Barrier NOI**").

Therefore, vigorous enforcement of a meaningful broadcast EEO policy is one effective way to reduce market entry barriers for minorities and women. Such action by the FCC would be especially timely, given the national policy embodied in Section 257 of the Telecommunications Act of 1996 which eliminates barriers to small business entry into the telecommunications market.

⁶ The real problem that the Commission should be focusing on is how to make EEO more effective. To this end, Commenters support the suggestions made in the Comments of the National Council of Churches et al.

Women in Radio and Television ("AWRT") that a negotiated rulemaking will yield solutions that are less damaging to broadcast EEO.⁷ Finally, we urge the Commission to clarify and refine its forfeiture policy, both in terms of the predictability and amount of the penalty, to provide incentives for broadcast stations to comply with the EEO rule.

I. The Commission's current EEO policy does not unduly burden broadcast licensees.

As a threshold matter, the Commission's proposals to exempt additional broadcast stations from EEO filing and recordkeeping requirements⁸ assume that the current requirements impose undue administrative burdens on these stations.⁹ We disagree. Any effective EEO policy involves the "burden" of recruiting qualified minorities and women, and keeping records of those recruitment efforts.¹⁰ Beyond that, the Commission's EEO enforcement policy merely requires that broadcast licensees file the two-page Broadcast Station Annual Employment Report (Form 395-B) each year, and the slightly more detailed Broadcast Equal Employment Opportunity Program Report (Form 396) at license renewal. Broadcast licensees and permittees

⁷ See Comments of American Women in Radio & Television, Inc., Section II.

⁸ See Streamlining Broadcast EEO Rule and Policies, Vacating the EEO Forfeiture Policy Statement and Amending Section 1.80 of the Commission's Rules to Include EEO Forfeiture Guidelines, Order and Notice of Proposed Rulemaking, 11 FCC Rcd. at para. 21 [hereinafter "Notice"].

⁹ By undue burdens, we mean any burden that is not an essential part of doing business. Recruiting, employing, and promoting qualified minorities and women are necessary parts of the obligation a broadcast station has to serve the public interest, and thus are costs of doing business.

¹⁰ See supra Section I.

simply have not documented the existence of the “undue” administrative burden of which they complain.

Without substantial evidence of this “undue” burden, the Commission has no rational basis for adopting the proposals in the Notice. To the extent that broadcasters are complaining about the recordkeeping requirements, there is little that the Commission can do to relieve that burden without undermining the EEO Rule.¹¹ Adequate recordkeeping is necessary for accurate self-assessment and the Commission expressly declines to eliminate the self-assessment requirement.¹² Once a station engages in self-assessment, little administrative burden is involved in periodically reporting the information a station collects to adequately self assess.

Even if an administrative burden existed, we believe that the Telecommunications Act of 1996 (“Telecom Act”), provides all necessary relief. By expanding license terms to eight years, the frequency with which broadcast licensees are required to file Form 396 is significantly reduced.¹³

¹¹ It is more likely that the complaints about recordkeeping and filing burdens mask dissatisfaction regarding time and money spent on recruiting qualified minorities and women. Yet, recruitment is the essence of the EEO rule. If broadcasters are actually complaining about the recruitment requirements, the Commission can provide little relief.

¹² Notice, at para. 45 (“While recordkeeping and self-assessment are distinct concepts, recordkeeping is an important component of self-assessment. If a station does not keep adequate records, it cannot meaningfully assess the effectiveness of its EEO program.”)

¹³ Telecommunications Act of 1996, Pub. L. No. 104-104, §203, 204, 110 Stat. 56 (1996) (“Each license granted for the operation of a broadcasting station shall be for a term not to exceed 8 years.”)

To the extent the Commission believes that further relief is nonetheless warranted, we support AWRT's proposal to transform the streamlining portion of this proceeding into a negotiated rulemaking. We agree with AWRT that a less adversarial process might help facilitate a compromise that does not harm broadcast EEO, but updates the manner in which broadcast licensees comply with EEO requirements. For example, Commenters recognize the possibility of reducing the burden on licensees through electronic recordkeeping and filing as well as by utilizing new technology to improve and streamline recruitment.¹⁴

II. The Commission's streamlining proposals would significantly undermine the effectiveness of its EEO policy.

In paragraphs 21-26 of the Notice, the Commission seeks comment on which categories of broadcast licensees should qualify for reduced EEO recordkeeping and filing requirements, and on three proposals for reducing those requirements.

Specifically, the Commission requests comment on whether stations with small staffs or stations located in small markets or in areas with a small minority labor force should be eligible for (a) an unqualified exemption from recordkeeping and filing requirements,¹⁵ (b) the opportunity to satisfy their recruitment obligation by attending job fairs or other

¹⁴ In its 1994 report to Congress, the Commission acknowledged that technology might be one way to address administrative burdens. The Commission stated: "Regarding relief from administrative burdens, we believe that the technological advances will lend themselves to a more 'on-line approach' to our various filing requirements. However, we note that further investigation of this area is warranted in order to fully comprehend the extent of such administrative burdens and to shed light on some of the more innovative ways that the Commission can streamline its filing requirements." 1994 Report to Congress, at 6315-16.

¹⁵ Notice, at para. 23.

recruitment events,¹⁶ or (c) an exception from recordkeeping and filing requirements if the station meets certain employment benchmarks.¹⁷ The Notice further states that the Commission's goal is to "maintain EEO requirements that are not unduly burdensome. . . and, at the same time, ensure an effective EEO enforcement program for the broadcast industry."¹⁸ Under this standard, any burden-reducing proposal would have to further the purpose of the EEO rule--to increase minority and female recruitment and deter discriminatory employment practices. None of the approaches that the Notice advances would achieve that goal.¹⁹

¹⁶ Notice, at para. 24.

¹⁷ Notice, at para. 25.

¹⁸ Notice, at para. 16 (emphasis added).

¹⁹ Moreover, to the extent these proposals affect broadcast television stations, they would require Congressional approval. As the Commission recognizes in paragraph 27 of the Notice, the 1992 Cable Act prohibits the Commission from revising the EEO regulations or forms for television licensees. Cable Television Consumer Protection & Competition Act of 1992, Pub. L. No. 102-385, §22(f), 106 Stat. 1460 (1992)(hereinafter "1992 Cable Act"). The only exception to this prohibition is for "nonsubstantive technical or clerical revisions . . . as necessary to reflect changes in technology, terminology, or Commission organization." 1992 Cable Act, § 334(c).

But, Congress sent an even stronger signal than the description in the Notice suggests. The 1992 Cable Act actually "incorporat[ed] into the Communications Act the FCC's forms, FCC Form 395-B annual employment report and the FCC Form 396 Broadcast Equal Opportunity Program Report, for television stations." H.R. Conf. Rep. No. 124, 102d Cong., 2d Sess. 862, 97 (1992). In addition, Congress stated its intent "that both of these reports continue to be filed with the FCC by television broadcast licensees and permittees in the same manner, with the same format and content and same terms and conditions as in effect on September 1, 1992." Id. (emphasis added).

The Commission has previously recognized the unambiguous intent of Congress. In its Order implementing Section 22 of the 1992 Cable Act, the Commission rejects proposals made by the NAACP to revise certain EEO forms as well as the broadcast EEO rule and stated, "The 1992 Cable Act explicitly prohibits revisions to these forms and the broadcast EEO Rule as they apply to broadcast

To the extent that any of the Commission's proposals reduce the number of broadcast stations that are subject to the EEO rule, they will significantly undermine broadcast EEO. For example, linking reduced EEO enforcement to the size of the broadcast station would exempt more than half of all broadcast stations from recordkeeping and filing requirements.²⁰ As the data the Commission provides in footnote 34 of the Notice reveals, extending the recordkeeping and filing exemption from stations with five or fewer employees to stations with 10 or fewer employees, would exempt 50.5 percent of all broadcast stations from EEO requirements.²¹ If the Commission were to extend the exemption to stations with 15 or fewer employees, 62 percent of all broadcast stations would be exempt.²²

Commenters are also concerned that with the changes resulting from the passage of the Telecommunications Act, the percentage of exempt stations could be even higher than those figures indicate. As the Commission knows, with the removal of

television stations." Implementation of Section 22 of the Cable Television Consumer Protection and Competition Act of 1992, Report and Order, 8 FCC Rcd. 5389, 5390 n.16 (1993).

More recently, in its Market Entry Barriers proceeding, the Commission notes: "Congress . . . endorsed our EEO rule and forms for television licensees by prohibiting the Commission from amending them . . ." Market Entry Barriers NOI, at para. 23. Thus, none of the proposed changes to the EEO rule or forms could apply to television stations without a statutory change.

²⁰ See Notice, at para. 23.

²¹ 6,684 (stations with fewer than 10 employees) ÷ 13,230 (total # of stations subject to EEO rule in 1994).

²² 8,238 (stations with 15 or fewer employees) ÷ 13,230 (total # of stations subject to EEO rule in 1994).

the national ownership limits for radio and the liberalization of other local and national ownership rules, the broadcast industry, and particularly the radio industry, is experiencing an unprecedented wave of mergers and acquisitions.²³ Commenters are concerned that a licensee with multiple stations in a market could evade EEO reporting requirements by allocating employees in such a way that some or all stations would fall below the threshold. At a minimum, the Commission should keep the reporting threshold at its current level thus minimizing incentives for such gaming of the system. In addition, where an entity holds more than one license within the MSA, the Commission should consider the total number of employees of that licensee in applying the EEO rules. To do otherwise ignores the realities of the marketplace and will significantly reduce employment opportunities for minorities and women.

Recordkeeping and reporting are essential to effective EEO enforcement. Without accurate data, no meaningful enforcement can occur. And without enforcement, there is little likelihood of compliance. Eliminating recordkeeping requirements would gut the entire petition to deny process—a process on which the Commission relies as the primary method of assessing whether a licensee is discharging its public interest obligations within its community of license. Virtually every case where the FCC has found an EEO violation was triggered by a petition to deny the renewal of the station's license. Without information from forms 395 and 396,

²³ See e.g., The Reordering of Radio, Broadcasting & Cable, July 1, 1996, at 6; Infinity: Only the beginning? Id. at 7.

a party in interest would not be able to mount prima facie challenges to license renewals on EEO grounds.²⁴

Moreover, all of the “streamlining” proposals rest on the faulty assumption that staff and market size or the size of the local minority labor force make recruiting minorities and women difficult. This is simply not the case. Broadcast licensees argue that small stations face difficulties in recruiting minorities and women because of “low salaries and availability of mostly entry level positions, competition with communications companies in larger markets and/or with larger staffs and other local employers, and limited financial, personnel, and time resources available for recruiting.”²⁵ However, all of these factors apply equally to minority and non-minority as well as male and female applicants. There is no evidence that minority or female applicants are less willing to accept entry level positions; in fact, it is much more likely that they would be more willing to accept these positions.

²⁴ A review of the recent license renewal cases where petitions to deny based on EEO violations were filed reveals that in each case, the Petitioners relied on the data that the licensee had submitted to the Commission. If licensees were neither required to keep recruitment records nor to submit reports to the Commission, Petitioners would have no way of assessing the station’s recruitment efforts even where they suspect discriminatory employment practices. And without recordkeeping and reporting requirements, the public and the Commission may not even suspect that a particular broadcast station might be discriminating against minorities and women. Indeed, the public would have no access to a station’s employment profiles that would show an absence of minority and/or female employees, much less information that would identify the cause.

²⁵ See Notice, at para. 20.

III. The Commission must establish higher forfeitures for EEO violations if EEO forfeitures are to effectively deter discriminatory employment practices.

In addition to advancing “streamlining” proposals, the Notice invites comment on proposed EEO forfeiture guidelines.²⁶ We support the Commission’s effort to adopt forfeiture guidelines that provide a clear, intelligible standard by which broadcasters can measure their EEO conduct.²⁷ We also support the Commission’s plan to incorporate the guidelines into Section 1.80 of its rules²⁸ and agree that such action, far from imposing a new standard of conduct, would simply reinvigorate the current standard by making the threat of forfeiture meaningful.²⁹ Clear forfeiture guidelines will add a degree of predictability and certainty that the current approach lacks and, as a

²⁶ Notice, at paras. 37-45.

²⁷ Andrea D. Williams, The Lowest Unit Charge Provision of the Federal Communications Act of 1934, as Amended, and its Role in Maintaining a Democratic Electoral Process, 45 Fed. Comm. L. J. 265, 281 (1993) (discussing violations of the lowest unit charge provision of the Commission’s political programming policies, the author states, “If broadcasters knew that the probability of an audit was great, and lack of compliance resulted in strict penalties, i.e. large forfeitures or loss of license, broadcasters may re-examine the legitimacy of their sales practices Thus, . . . a high probability of an audit as well as strict penalties are necessary for this method to ensure compliance.”)

²⁸ Notice, at para. 37.

²⁹ Notice, at para 47. The Commission also requested comment on the effective date of its forfeiture rule. Notice, at para. 37. Given the broadcasters’ long familiarity with the requirements of the FCC’s EEO rule and the fact that the substance of that rule will in no way be altered, we urge the Commission to give the guidelines immediate effect. Id.

result, increase the deterrent value of the forfeiture penalties.³⁰ In this regard the Notice is a good starting point, but it does not go far enough. If forfeitures are to function as an effective deterrent, a broadcast licensee's EEO conduct must be subject to larger forfeiture amounts and a more comprehensive review. Therefore, we urge the Commission to increase the proposed base forfeiture amount so that it more accurately reflects the gravity of the offense and is substantial enough that broadcasters will aim their EEO efforts well above the minimum standard that the forfeiture guidelines specify.

A. The Commission's proposed base forfeiture amount does not adequately reflect the importance of the EEO rule and the relative gravity of the offense.

At para. 39 of the Notice, the Commission proposes a base forfeiture amount for violation of the broadcast EEO rule of \$12,500, which is 50 percent of the statutory maximum for broadcast EEO violations.³¹ Section 503(b)(2)(D) of the Communications Act of 1934 requires that the Commission, in determining the amount of a forfeiture

³⁰ Notice at para. 3 (noting that "[T]he Commission's broadcast EEO requirements serve two objectives: to promote programming that reflects the interests of minorities and women in the local community . . . and to deter discriminatory employment practices.") As the Notice recognizes, "[D]eterrence of unlawful discrimination, rests on the belief that a broadcaster that engages in unlawful discrimination cannot, by definition, fulfill the needs of the entire community." Id.

³¹ The statutory maximum is \$25,000 for each violation or each day of a continuing violation, up to a total of \$250,000 for a single act or failure to act. 47 U.S.C. §503(b)(2)(A)(1994). "[B]ase forfeiture amounts are based on a ranking of the relative gravity of the violation involved. The base amounts are computed as a percentage of the statutory maximum for the service involved." Standards for Assessing Forfeitures, Policy Statement, 6 FCC Rcd. 4695, 4695 (1991) (hereinafter "1991 Policy Statement").

penalty, take into account the “nature, circumstances, extent, and gravity of the violation” as well as the degree of culpability of the violator.³² Historically, the Commission has also sought to ensure “ that forfeiture amounts are consistent for similar types offenses.”³³ Commenters submit that a base forfeiture amount of \$12,500 is not commensurate with the importance of the EEO rule or the relative gravity of EEO violations and does not provide a meaningful incentive for broadcasters to comply.

The importance of the Commission’s EEO rule is beyond dispute. The Commission has repeatedly recognized the significance of, and reaffirmed its commitment to, its EEO rule as a means of promoting diversity of programming on broadcast stations and enhancing access by minorities and women to increased employment opportunities.³⁴ In its 1994 report to Congress, the Commission stated that diversity of expression in the media advances a significant national policy and

³² 47 U.S.C. §503(b)(2)(D) (1994) (emphasis added).

³³ Standards for Assessing Forfeitures, Policy Statement, 8 FCC Rcd. 6215, 6215 (1993) (hereinafter “1993 Policy Statement”).

³⁴ See e.g., Standards for Assessing Forfeitures for Violations of the Broadcast EEO Rules, Policy Statement, 9 FCC Rcd. 929, 929 (1994) (hereinafter “1994 Policy Statement”) (stating “[i]n addition to promoting program diversity, our broadcast EEO rules enhance access by minorities and women to increased employment opportunities”); Implementation of Commission’s Equal Opportunity Rules, Notice of Inquiry, 9 FCC Rcd. 2047, 2047 (noting the twin aims of the EEO Rule: greater programming diversity and enhanced employment opportunities for women and minorities).

See also 1994 Policy Statement, at 929 (stating “[t]he Commission’s broadcast EEO rules and other policies which promote participation by minorities and women in the broadcast industry are vitally important. They further the Commission’s goals of promoting diversity of programming on broadcast stations. We reaffirm our commitment to this bedrock goal underlying our broadcast EEO rules”)

requires rigorous enforcement of the EEO Rule.³⁵ In addition, the Supreme Court has underscored that “[s]afeguarding the public’s right to receive a diversity of views and information over the airwaves is . . . an integral component of the FCC’s mission.”³⁶ Therefore, not only do EEO violations reduce diversity of viewpoints and hinder employment of minorities and women, but each broadcaster who—either through inadvertence or intent—flouts the Commission’s authority and ignores its EEO rule, impairs the Commission’s ability to fulfill its mission.

Moreover, broadcast licensees have been aware of their obligation to actively recruit minorities and women for more than two decades. Therefore, violations of the EEO rule are willful failures to act. More importantly, EEO violations often occur over a substantial period of time (now up to eight years in the case of radio) and have far-reaching consequences.

Compared to other serious violations of the public interest, the proposed base amount, \$12,500, is ridiculously low. It is substantially less than forfeitures the FCC has assessed for violating commercial limits on children’s television programs, which have been as high as \$125,000.³⁷ By making the penalty for EEO violations so

³⁵ 1994 Report to Congress, at 6278; 1992 Cable Act, §22(a)(2-3).

³⁶ Metro Broadcasting v. FCC, 497 U.S. 547, 548 (1990). See also NAACP v. Federal Power Commission, 425 U.S. 662, 670, n.7 (1976) (finding that the Commission’s EEO policy was necessary to satisfy the statutory mandate set forth in the 1934 Communications Act of promoting programming diversity).

³⁷ Clear Channel Television, 77 RR 2d 719, 719 (1995). See also Northstar Television of Erie, 77 RR 2d 723, 723 (1995) (advising licensee of liability of forfeiture for \$100,000 for repeated violations of commercial limits in children’s programming); Paramount Stations of Houston, 9 FCC Rcd. 140, 140 (1993) (advising licensee of

“affordable,” it becomes cost effective to ignore the EEO requirements and pay the penalty later in the unlikely event that the station is “caught.”

Commenters thus urge the Commission to increase the proposed base forfeiture amount to 75 percent of the statutory maximum (i.e., to \$18,750) so that forfeitures provide an effective incentive for licensees to comply with the Commission’s EEO rules as well as impose meaningful penalties on non-complying broadcasters.

B. The Commission should clarify and redefine the language of its EEO forfeiture guidelines to increase the base forfeiture amount and provide greater certainty to broadcasters.

The proposed forfeiture guidelines would impose a \$12,500 forfeiture when a broadcast licensee “[fails] to recruit for at least 66% of all vacancies for the period under review so as to attract an adequate pool of minority and female applicants.”³⁸ In addition to the concern that the proposed base forfeiture amount is too low, Commenters believe that the proposed forfeiture rule is ambiguous and provides an incentive for broadcasters to partially, rather than fully, comply with the Commission’s EEO rule.

The Notice seeks comment on the forfeiture guideline as well as on the definitions of the terms that the guidelines utilize.³⁹ The proposals we make below aim to both clarify the forfeiture standard and increase the base forfeiture amount.

liability of forfeiture of \$80,000 for willful and repeated violations of commercial limits in children’s programming).

³⁸ Notice, at para. 39.

³⁹ Notice, at para. 42.

1. The EEO forfeiture rule should require broadcast licensees to recruit for every vacancy.

The Commission's current EEO policy requires that licensees recruit females and minorities for each vacancy.⁴⁰ As the Commission repeatedly acknowledges, "[t]o the extent that licensees fail to do so, female, as well as minority recruitment is affected."⁴¹ As an initial matter, therefore, we believe that the Commission is treading a fine line between identifying the actions that will lead to forfeiture penalties and endorsing the minimum level of compliance as a ceiling for which broadcasters should aim. We recognize the importance of identifying the cut-off point at which EEO conduct will warrant forfeiture, but believe it is equally critical that the 66 percent "failure to recruit" benchmark not send the message that a broadcast licensee need only recruit for 66 percent of vacancies. Rather, the "failure to recruit" threshold should represent the point at which the Commission is willing to assume that failure to recruit was inadvertent or due to circumstances beyond the licensee's control.⁴² Simply put, the

⁴⁰ 47 C.F.R. § 73.2080(c)(2); See e.g., Prettyman Broadcasting Company, FCC 96-230, at n.2 (1996) (stating "[t]he licensee is reminded that under our EEO Rule, 47 C.F.R. § 73.2080, it has an obligation to recruit for females and minorities for each vacancy.")

⁴¹ See e.g., Prettyman, at n.2.

⁴² One such situation might be where an essential employee quits without notice, and the broadcaster must replace that employee immediately. Even in these circumstances, however, it should not be assumed that recruitment is impossible, especially given the Internet, fax, and other technologies that make recruitment easier and faster.

forfeiture guideline should merely signal the border between permissible efforts and a failure to recruit warranting the imposition of a forfeiture.

Recruitment for every vacancy is vital, since it is the broadcaster's control over which jobs to offer minorities and women that blanket recruitment seeks to avoid. If stations fail to recruit for every vacancy, or could pick and choose the vacancies for which they believed minorities or women best suited, upper level management positions would likely be foreclosed to minorities and women, defeating the ultimate purpose of the FCC's equal employment opportunity policy. We therefore urge the Commission to include in its forfeiture rule language that would clarify the licensee's obligation to recruit for every vacancy.

2. The term "violation" should be redefined so that the "failure to recruit" threshold varies with the size of the station.

Commenters believe that the 66 percent threshold, regardless of a station's size, is too low. This static threshold does not recognize that larger stations generally will have greater resources with which to recruit and, therefore, should have to recruit for a greater percentage of their vacancies. The static threshold also yields counterintuitive results; for example, a small station with nine vacancies during its license term would not be assessed a forfeiture if it failed to recruit for three of those vacancies ($.66 \times 9 = 3$); a large station with 75 vacancies could fail to recruit for 25 vacancies and also avoid penalty. This approach does not do enough to advance equal employment opportunity goals.

We urge the Commission to establish a higher recruitment threshold for avoiding forfeitures for larger stations. We suggest that the threshold be set at 90 percent for stations with 50 or more employees, 80 percent for stations with 16 to 49 employees, and 75 percent for stations with 15 or fewer employees. This approach is consistent with the Commission's goal of increasing recruitment without imposing a substantially greater burden.

3. **The term "period under review" should be defined so that the Commission can analyze the licensee's EEO conduct for each year of the license term, separately.**

The Commission proposes to define "period under review" as the last three years of the license term or however long the present licensee has owned the station, whichever is less.⁴³ Commenters object to limiting the period under consideration to the present owner. Stations change hands frequently, and as a result of the changes in the ownership rules and license terms, are likely to be sold even more often in the future. The effect of the Commission's proposal is a virtual invitation to licensees to discriminate and then avoid the consequences by selling the station prior to renewal. It would also constitute an unexplained departure from long-standing Commission practice.⁴⁴

⁴³ Notice, at para. 44.

⁴⁴ As the Commission stated in Woolfson, "[W]e see no public interest reason not to impose those measures [forfeitures] ... simply because the license is being assigned. Such an approach would permit a station with defective EEO performance to be passed to different owners over a period of time without having to comply with our EEO rules." Woolfson Broadcasting Corporation of Salisbury/Ocean City, 4 FCC Rcd. 6160, 6161 (1989). See also Petition for Reconsideration of Notice of Apparent

Commenters also oppose limiting review to the last three years of the license term. Broadcast licensees have an obligation to serve the public interest and to maintain a positive, continuing program to ensure equal employment opportunity, not simply during the last three years of the license term, but during the entire period of its license. Historically, licensees have been able to circumvent this obligation by recruiting only during the last three years of the license term. Now that license terms are being extended to eight years, the Notice's proposal to review only the last three years would allow licensees to ignore their EEO responsibilities for five years without fear of penalty. To prevent this, the Commission should define the "period under review" to include the entire license term.

Commenters also suggest that each year of the license term be treated separately for purposes of determining violations of the EEO rules. At present, the Commission appears to view "violation," in the EEO context, as a failure to recruit during the three-year period under review. Section 503(b)(2)(A) of the Communications Act grants the Commission authority to assess forfeitures for "each violation or each day of a continuing violation."⁴⁵ Thus, the Commission clearly has the authority to define the "period under review" so that the licensee's recruitment efforts during each year of the license term are analyzed separately, and a failure to recruit at

Liability of MEG Associates, 7 FCC Rcd. 1659, 1659, 1661 (1992) (refusing to reconsider the forfeiture assessed for defective EEO performance even though the current licensee had taken license five months prior to the Commission's disposition on the license renewal application).

⁴⁵ 47 U.S.C. § 503(b)(2)(A).

or above the required percentage during any year would constitute an EEO violation for which a separate forfeiture would be assessed. This approach has two distinct advantages in terms of facilitating vigorous enforcement of the EEO rule: first, it increases the forfeiture amount, making it uneconomical to ignore EEO obligations and second, it gives licenses an incentive to examine and improve their EEO efforts during each year of the license term.

If modified along the lines suggested in these comments, a forfeiture rule can be an effective incentive for EEO compliance. We think it is important for the FCC to adopt an effective forfeiture policy regardless of whether it makes any other changes in its EEO policy. To the extent, however, that the Commission adopts any of the “streamlining” proposals, it has become more important than ever to have a strong forfeiture policy to act as a meaningful detriment to stations tempted to ignore their EEO obligations.

Conclusion

Given the lack of evidence of “undue” administrative burdens and the importance of recordkeeping and reporting to the effectiveness of any EEO policy, Commenters urge the Commission not to retreat from its commitment to equal employment opportunity for minorities and women. We further urge the Commission to seek a less damaging solution by bringing all the interested parties together in a